Nos. 420 and 421

FEB 11
CHARLES ELMOR

IN THE

Supreme Court of the United States

OCTOBER TERM 1936

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

FRUEHAUF TRAILER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMERICAN FEDERATION OF LABOR, *AMICUS CURIAE*

CHARLTON OGBURN,
Counsel for Amicus Curiae.

ARTHUR E. REYMAN,
Of Counsel.

INDEX

	PAGE
Statute involved	2
Opinion below	2
Proceedings of the Board	2
Summary of argument	3
Argument:	
Point I. The National Labor Relations Act is a valid enactment under the power of Congress to regulate commerce among the several States	4
A. In general, the Act does not exceed the power as heretofore exercised	4
B. Specifically, the power of Congress to lift obstructions to interstate commerce is well defined	10
C. The findings and policy declared in section 1 of the Act are entitled to weight in determining the Act's validity	20
D. That the Act may incidentally affect matters other than those directly entrusted to the Federal Government to regulate does not impair its validity	24
Point II. The Act does not contravene the Fifth Amendment	27
Point III. The Act does not contravene the Seventh Amendment	34
Point IV. The provisions of the Act are not an unconstitutional delegation of legislative or judicial power	36
Point V. The Board's findings are entitled to weight; and its order should be enforced	36
Conclusion	38

CASES CITED

Cases:	
A. L. A. Schechter Poultry Corp. et al. v. *United States*, 295 U. S. 495	5, 9, 10, 11, 18
Adair v. *United States*, 208 U. S. 161	31, 33
Agwilines, Inc. v. *National Labor Relations Board*, Decided Dec. 22, 1936 (C. C. A. 5th)	34
American Can Co. v. *Ladoga Canning Co.*, 44 Fed. (2d) 763; (cert. den. 282 U. S. 899)	16
American Column & Lumber Co. v. *United States*, 257 U. S. 377	15
American Steel Foundries v. *Tri-City Central Trades Council*, 257 U. S. 184	28

Cases—Continued. PAGE

Anderson v. *United States*, 171 U. S. 604 16
Bedford Cut Stone Co. v. *Journeymen's Stonecutters' Assn.*, 274 U. S. 37 14
Block v. *Hirsh*, 256 U. S. 135 20
Board of Trustees of University of Illinois v. *United States*, 289 U. S. 48 23
Carter v. *Carter Coal Co., et al.*, 298 U. S. 238 19
Chicago B. & Q. R. R. v. *McGuire*, 219 U. S. 549 33
Chicago Board of Trade v. *Olsen*, 262 U. S. 1 10, 21
Clark Distilling v. *Western Maryland Ry. Co.*, 242 U. S. 311 26
Colorado v. *United States*, 271 U. S. 153 7
Coppage v. *Kansas*, 236 U. S. 1 31, 33
Coronado Cases, 259 U. S. 344; 268 U. S. 295 18
Crowell v. *Benson*, 285 U. S. 22 36
Dayton-Goose Creek R. v. *United States*, 263 U. S. 456 7
Duplex Printing Press Co. v. *Deering*, 254 U. S. 443 13, 14
Eastern States Lumber Ass'n. v. *United States*, 234 U. S. 600 15
Ex parte Curtis, 106 U. S. 371 23
Farmers and Mechanics National Bank v. *Deering*, 91 U. S. 29 23
Federal Radio Commission v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266 36
Federal Trade Commission v. *Algoma Lumber Co.*, 291 U. S. 67 36, 37
Federal Trade Commission v. *Pacific States Paper Trade Ass'n.*, 273 U. S. 52 36, 37
Florida v. *United States*, 292 U. S. 1 7
Fruehauf Trailer Company, Matter of, 1 D. & O., N. L. R. B. 68 37
Gibbons v. *Ogden*, 9 Wheat. 1 6
Gompers v. *Buck's Stove & Range Co.*, 221 U. S. 418 33
Hammer v. *Dagenhart*, 247 U. S. 251 24, 25
Hoke v. *United States*, 227 U. S. 308 27
Home Building & Loan Ass'n. v. *Blaisdell*, 290 U. S. 398 22
Hopkins v. *United States*, 171 U. S. 578 16
Houston E. & W. T. R. v. *United States*, 234 U. S. 342 7
In re Debs, 158 U. S. 564 18
International Text Book Co. v. *Weissinger*, 160 Ind. 349 33
Julliard v. *Greenman*, 110 U. S. 421 23
Kidd v. *Pearson*, 128 U. S. 1 19
Knoxville Iron Co. v. *Harbison*, 183 U. S. 13 33
Legal Tender Cases, 12 Wall. 457 23
Lemke v. *Farmers Grain Co.*, 258 U. S. 50 17
Ling Su Fan v. *United States*, 218 U. S. 302 23
Local 167 v. *United States*, 291 U. S. 293 18
Loewe v. *Lawlor*, 208 U. S. 274 17
McCray v. *United States*, 195 U. S. 27 25
McCullough v. *Maryland*, 4 Wheat. 316 23
McLean v. *Arkansas*, 211 U. S. 539 33

Cases—Continued. PAGE

Minnesota Rate Cases, 230 U. S. 352 6
Nebbia v. *New York*, 291 U. S. 502 33
Northern Securities Co. v. *United States*, 193 U. S. 197 15, 23
Pennsylvania Federation v. *Pennsylvania R. R. Co.*, 267 U. S. 203 29
Pennsylvania R. R. Co. v. *United States Railroad Labor Board*, 261 U. S. 72 29
Railroad Commission v. *C. B. & Q. R. R.*, 257 U. S. 563 7
Second Employers' Liability Cases, 223 U. S. 1 8
Shield v. *Thomas*, 59 U. S. 253 34
Southern Ry. Co. v. *United States*, 222 U. S. 20 8
Stafford v. *Wallace*, 258 U. S. 495 11, 21, 22
Standard Oil Co. v. *United States*, 283 U. S. 163 17
Swift & Co. v. *United States*, 196 U. S. 375 11, 12, 19
Tagg Bros. & Moorehead v. *United States*, 280 U. S. 420 18
Texas & New Orleans R. R. Co. v. *The Brotherhood*, 281 U. S. 548 27, 30, 34
Transit Commission v. *United States*, 289 U. S. 121 7
United Fuel Gas v. *Hallahan*, 257 U. S. 277 17
United Leather Workers v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457 16
United States v. *Brims*, 272 U. S. 549 14
United States v. *E. C. Knight Co.*, 156 U. S. 1 16
United States v. *Ferger*, 250 U. S. 199 17
United States v. *Fisher*, 2 Cranch 358 23
United States v. *Louisiana*, 290 U. S. 70 7
United States v. *Reading Co.*, 226 U. S. 324 17
United States v. *Trenton Potteries*, 273 U. S. 392 15, 16

STATUTES CITED

Adamson Act, 39 Stat. 721; 45 U. S. C., s. 65 29
Anti-Trust Acts, 26 Stat. 209; 15 U. S. C., ss. 1-7, 15; 38 Stat. 730; 15 U. S. C., ss. 12-27, 44; 18 U. S. C., s. 412; 28 U. S. C., ss. 381-383, 386-390; 29 U. S. C. 52 10, 12, 14, 15, 16, 17, 28
Bituminous Coal Conservation Act of 1935, 49 Stat. 1008 19
Erdman Act, 30 Stat. 424 29
Federal Trade Commission Act, 38 Stat. 717; 15 U. S. C., ss. 41-51 36, 37
Grain Futures Act, 42 Stat. 998; 7 U. S. C., ch. 7 10, 11
National Labor Relations Act, 49 Stat. 449; 29 U. S. C., ss. 151-166 2
Newlands Act, 38 Stat. 103 29
Packers and Stockyards Act, 42 Stat. 159; 7 U. S. C., ss. 181-193, 191-195, 201-203, 205-217, 221-229 18
Railway Labor Act, 44 Stat. 577; 45 U. S. C., ch. 8 19, 29, 30, 33, 34

Statutes Cited—Continued. PAGE

Transportation Act of 1920, T. III, 41 Stat. 469 29
Webb-Kenyon Act, 37 Stat. 699; 27 U. S. C., s. 122 26
White Slave Act, 36 Stat. 825; 18 U. S. C., ss. 397-404 26
25 Stat. 501 29

MISCELLANEOUS

Monthly Labor Review, May 1936 24
National Labor Relations Board, First Annual Report ..... 20 (Note)
National Labor Relations Board, Division of Economic Research, Bulletin No. 1, August 1936 ..... 20 (Note), 30

IN THE

Supreme Court of the United States

OCTOBER TERM 1936

Nos. 420 and 421

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

FRUEHAUF TRAILER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE

The American Federation of Labor represents to this Honorable Court that it is a federation of national and international trade and labor unions and State and central labor bodies. Its members are gravely concerned with the judicial construction of the National Labor Relations Act, and the questions of law arising thereunder which are involved in this case; and by reason thereof it respectfully asks permission to file its brief as *amicus curiae* in support of the constitutionality of the Act and in support of the

validity of the order of the National Labor Relations Board which is involved herein.

STATUTE INVOLVED

This case involves the provisions of the National Labor Relations Act (July 5, 1935, c. 372, s. 16, 49 Stat. 449; 29 U. S. C., ss. 151-166).

The Act creates a National Labor Relations Board, and in section 10 thereof provides administrative and court procedure for the prevention of those "unfair labor practices affecting commerce". Under the authority vested in it by section 6 of the Act, the Board has issued general rules and regulations setting out the procedure through which cases arising under the Act are dealt with by the Board.

OPINION BELOW

The National Labor Relations Board filed a petition in the Circuit Court of Appeals for the Sixth Circuit for the enforcement of an order issued by it in proceedings instituted against the Fruehauf Trailer Company; and the Fruehauf Trailer Company filed its petition in that court seeking a review of the Board's order and praying that it be set aside. That court dismissed the petition of the Board and set aside its order. 85 Fed. (2d) 391.

This Court granted certiorari on November 9, 1936.

PROCEEDINGS OF THE BOARD

The National Labor Relations Board, hereinafter called the Board, upon charges filed by United Automobile Workers' Federal Labor Union No. 19375, directly affiliated with the American Federation of Labor and comprising employes of the Fruehauf Trailer Company, hereinafter called the Company, filed two complaints dated respectively Octo-

ber 23 and 29, 1935, charging the Company with unfair labor practices as defined in section 8, subdivisions (1) and (3) of the National Labor Relations Act, in that the Company interfered with, restrained and coerced its employes in the exercise of the rights guaranteed in section 7 of the Act and discriminated in regard to the hire and tenure of employment of certain employes so as to discourage membership in the union. The cases were consolidated for hearing and were heard by the Board on November 6, 7, and 8, 1935, upon the complaints, the motions to dismiss and the answers, and upon the evidence offered by the parties. The Board found that seven employes had been discharged because of union activities, and that by each and all of the discharges so made and by threats against its employes, the Company had interfered with, restrained and coerced its employes in the exercise of the rights guaranteed in section 7 of the Act. The complaints were sustained; and upon its findings of fact and conclusions of law, the Board ordered the Company to cease and desist (a) from discharging or threatening to discharge employes for joining or assisting the union; (b) from employing detectives for espionage within the union; and (c) from in any other manner interfering with the employes in the exercise of self-organization. The Company also was ordered to reinstate the discharged employes with back pay for time lost.

We shall not attempt here to set out any more fully than this the facts and proceedings before the Board and the Board's findings of fact, all of which are dealt with more fully, we assume, in the Board's brief.

SUMMARY OF ARGUMENT

POINT I. The National Labor Relations Act is a valid enactment under the power of Congress to regulate commerce among the several States.

A. In general, the Act does not exceed the power as heretofore exercised.
B. Specifically, the power of Congress to lift obstructions to interstate commerce is well defined.
C. The findings and policy declared in section 1 of the Act are entitled to weight in determining the Act's validity.
D. That the Act may incidentally affect matters other than those directly entrusted to the Federal government to regulate does not impair its validity.

POINT II. The Act does not contravene the Fifth Amendment.

POINT III. The Act does not contravene the Seventh Amendment.

POINT IV. The provisions of the Act are not an unconstitutional delegation of legislative or judicial power.

POINT V. The Board's findings are entitled to weight; and its order should be enforced.

ARGUMENT

Point I

The National Labor Relations Act Is a Valid Enactment Under the Power of Congress to Regulate Commerce Among the Several States.

A. IN GENERAL, THE ACT DOES NOT EXCEED THE POWER AS HERETOFORE EXERCISED.

The Constitution gives Congress the express power "to regulate commerce . . . among the several States," and it is in this grant of power that Congress found the authority

to enact the National Labor Relations Act—that is to say, if Congress has the power to enact a law with a view toward diminishing labor disputes, that power must be traced specifically to the commerce clause.

It has been said that the whole scheme of the Act is to regulate activities not in or directly affecting commerce, and for this reason the entire Act is unconstitutional. Nothing could be further from an accurate statement of the application of the Act. Its operation is limited. The limitation on its application is the same limitation that Congress has declared in the Act; namely, that labor disputes or their causes must in themselves or by their nature burden or obstruct (affect) commerce among the States.

This Court has not hesitated to sustain the regulatory power of Congress as applied even to manufacturing and to mining, when it was shown that interstate commerce was affected or involved. To argue that manufacture wholly within a State is without the power of Congress to regulate involves the assumption of a broad legal generalization, unfounded in fact, that manufacturing is never commerce and therefore cannot be reached by the regulatory power of Congress.

In the consideration of the power of Congress to regulate commerce, it is correct to say that if an act is within the power specifically conferred upon Congress it is not made any less constitutional because of any indirect effects that it may have, however obvious it may be that it will have those effects; so that even though, in the exercise of its power to regulate commerce, Congress incidentally intrudes upon the power of the States over local matters, this in itself does not render such exercise of legislative power invalid. *A. L. A. Schechter Poultry Corp. et al.*, v. *United States*, 295 U. S. 495 and cases cited on page 544. The primary purpose of the National Labor Relations Act is the promotion of interstate commerce through removing unfair labor practices, which burden the free flow thereof.

The power granted to Congress by the Constitution is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed". *Gibbons* v. *Ogden*, 9 Wheat. 1. This rule has been construed to mean that the legislature has the power to control interstate commerce, "intercourse", in all its branches, undiminished by the fact that it may interfere with the carrying out of the domestic policy of any State, including the right to prohibit.

The commerce clause was fully discussed by Chief Justice Marshall in the famous case of *Gibbons* v. *Ogden, supra*. Gibbons was operating two steamboats between New York and New Jersey, licensed under an act of Congress. The New York law granted to Livingston and Fulton the exclusive right to operate steamboats between the same States. Ogden, the assignee of Fulton and Livingston, secured an injunction in the State court to restrain Gibbons, licensee of Congress, from continuing to operate his boats, Ogden contending that the operation of the commerce clause was limited to the interchange of commodities and that the commerce over which the Federal Government had power did not include navigation. Marshall denied that argument and completely upheld the power of the Federal Government to regulate the whole field of national commerce. The only commerce which Marshall excluded from control under that power is that which, as to any State, is completely internal; and he laid down the doctrine that even though interstate commerce may be completely within a particular State and in addition be absolutely without effect in any other State, Congress may still regulate it if it becomes necessary to do so so as to make effective any one of the powers of the Government.

In the *Minnesota Rate Cases*, 230 U. S. 352 at 398, the Court quoted Marshall and approved the doctrine laid down in *Gibbons* v. *Ogden* and said:

> "The general principles governing the exercise of State authority, when interstate commerce is affected

are well established. The power of Congress to regulate commerce among the several States is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' (*Gibbons* v. *Ogden*, 9 Wheat. 1, 196). * * * "The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

It has been so many times held that the Federal Government can regulate intrastate rates, that a discussion of the cases seems unnecessary. See *Dayton-Goose Creek R.* v. *United States*, 263 U. S. 456, *United States* v. *Louisiana*, 290 U. S. 70, *Houston E. & W. T. R.* v. *United States*, 234 U. S. 342, and *Florida* v. *United States*, 292 U. S. 1, wherein the Court has held that the Federal Government can regulate intrastate rates, not only for the purpose of removing discriminations against persons or localities, but also to insure an adequate interstate transportation system.

In *Railroad Commission* v. *C. B. & Q. R. R.*, 257 U. S. 563; *Colorado* v. *United States*, 271 U. S. 153; and *Transit Commission* v. *United States*, 289 U. S. 121, the power of the Interstate Commerce Commission to authorize an interstate railroad to abandon as respects both interstate and intrastate commerce, a part of its line lying wholly within a State, has been upheld notwithstanding the State's objection to

such abandonment. In these cases the actual effect upon interstate transportation has been slight, as in the *Colorado* case, *supra*, where the operating deficit on the branch line under a period of approximately seven years was less than one per cent of the carrier's net railway operating income for those years.

In the *Second Employers' Liability Cases*, 223 U. S. 1, the Court had before it the second Employers' Liability Act, drafted to apply only to injuries sustained by employes while actually engaged in interstate commerce. Objection to the Act was made on the grounds, first, that the abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk had no tendency to promote the safety of employes or to advance the commerce in which they are engaged; and second, that the liability imposed for injuries sustained by one employe through the negligence of another, although confined to instances where the injured employe was engaged in interstate commerce, was not confined to instances where both employes were so engaged. The Court overruled both objections and upheld the Act, holding that the provisions of the law inclined to impel the carriers to avoid negligent acts and omissions, and tended to promote the safety of employes and to advance the commerce in which they were engaged; and also that the second objection was based on a mistaken theory in that it treated the *source* of the injury rather than its *effect* on interstate commerce as the criterion of Congressional power.

In *Southern Ry. Co.* v. *United States*, 222 U. S. 20, the Court upheld the Safety Appliance Act requiring safety couplers on cars hauled by an interstate railroad in intrastate traffic, the Court finding a sufficient relation between the conditions of safety appliances used in intrastate traffic with safety in interstate traffic, and declaring that the power of Congress over commerce is plenary

". . . and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it."

A. L. A. Schechter Poultry Corp. et al., v. *United States*, 295 U. S. 495, *supra*, has been regarded by some as a reiteration and summary of the law enunciated by this Court on the powers of Congress under the commerce clause of the Constitution. This is not strictly so. What the Court would reaffirm, we believe, is the principle that commodities transported in interstate commerce and having come to rest have passed the point of directly affecting interstate commerce and therefore are not subject to Federal regulation; and decisions of the Court which dealt with a stream of interstate commerce—where goods had come to rest within a State temporarily, later to go forward in interstate commerce—and with the regulation of transactions involved in that practical continuity of movement, were held not applicable in the *Schechter* case. Therefore, although the Court seems to have foreclosed any attempts to include within the definition of "commerce among the several States," goods which have come to rest after having reached their destination, we do not think that it has foreclosed the possibility of including within the scope of Congressional power to regulate, goods manufactured for shipment to other States, nor that in any sense has it denied the power of Congres to regulate or control matters affecting commerce, regardless of where any commodity may have been or may be, if it is involved in such a matter. In the *Schechter* case the Court said:

"In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they affect interstate commerce, there is a necessary and well-established distinction between direct and indirect effects,"

and pointed out that the distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Acts (26 Stat. 209; 15 U. S. C., ss. 1-7, 15; 38 Stat. 730; 15 U. S. C., ss. 12-27, 44; 18 U. S. C., s. 412; 28 U. S. C., ss. 381-383, 386-390; 29 U. S. C. 52).

The limitation of this decision is clearly fixed in one of its concluding paragraphs:

> "We are of the opinion that the attempt through the provisions of the code to fix the hours and wages of employes of defendants in their intrastate business was not a valid exercise of Federal power."

Where in the Court's condemnation of the attempt to regulate hours and wages can there be found any disapproval of the practical effects of the National Labor Relations Act? In the *Schechter* case the Court pointed out clearly the distinction between matters which directly and indirectly affect commerce. The scope of the *Schechter* decision cannot be made broader than it really is by asserting that it positively forbids indirect regulation of local activities. Certainly it does not make the power of Congress under the commerce clause any less than it has always been.

B. SPECIFICALLY, THE POWER OF CONGRESS TO LIFT OBSTRUCTIONS TO INTERSTATE COMMERCE IS WELL DEFINED.

Congress, in enacting the National Labor Relations Act, has undertaken to do no more with respect to the lifting of obstructions to the free flow of commerce than it has done in the past by means of other legislation, designed to effect the same result.

The Grain Futures Act (42 Stat. 998; 7 U. S. C. ch. 7) regulates interstate commerce and sales of grain for future delivery on boards of trade because it was found that by manipulation they had become a constantly recurring burden and obstruction to that commerce. In *Chicago Board*

of Trade v. *Olsen*, 262 U. S. 1, the validity of the Act was attacked on the ground of attempted regulation of purely intrastate transactions. The Court declined to accept this argument and followed the conclusions reached in *Swift & Co.* v. *United States*, 196 U. S. 375 (discussed *infra*) and cited that case as a "milestone in the interpretation of the commerce clause of the Constitution," and said that that case "recognized the great changes and development of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be." The Court also quoted with approval from *Stafford* v. *Wallace*, 258 U. S. 495, at 521:

> "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

This case clearly shows the distinction between what the Court found to be the indirect effects upon commerce considered in the *Schechter* decision, *supra*, and what it here finds to be direct effects upon commerce, and recognized the express declaration of Congress in the Grain Futures Act that

> "Transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein."

It impliedly reiterates a familiar principle of law that if Congress finds a certain condition to exist and if it is within the power of Congress to correct that condition, the Court will not inquire into the effects of the Act of Congress on purely local enterprise, but will recognize the right of Congress to remove obstructions and burdens upon commerce.

In *Swift & Co.* v. *United States, supra,* the Court had under consideration a suit in equity under the Sherman Act which charged a combination of the greater proportion of the dealers in fresh meats throughout the United States with not bidding against each other in the live stock markets of the different States, with bidding up prices for a few days in order to induce cattle men to ship their stock to the stock yards, with fixing prices at which they would sell, restricting shipments of meat when necessary to accomplish that purpose, with establishing a uniform rule of credit to dealers and keeping a blacklist, with making uniform and improper charges for cartage, and with getting less than lawful rates from the railroads to the exclusion of competitors. The defendants demurred on the ground, among others, that the suit was an attempt to regulate intrastate activities. Mr. Justice Holmes, speaking for the Court, said that

> "... although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote or merely probable. On the allegations the latter commerce, not less, perhaps even more, than commerce within a single state, is an object of attack [Citing cases]. Moreover, it is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted."

He further stated that commerce among the States is not a technical, legal conception, but a practical one, drawn from the course of business. He pointed out that

> "... when cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the contribution necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce."

In this case the Government argued successfully that although it was true that the individual transactions of the members of the combination took place separately within separate States, these transactions fell within the jurisdiction conferred upon Congress by the commerce clause of the Constitution, because together they created a current or stream of commerce between the States, and that the combination complained of directly affected this stream or current of commerce. The shipments of live stock were made with the express and sole purpose of sale, which, it was asserted, was analogous to the form or condition of the original package in the case of merchandise — the sales made directly by the defendants to dealers and consumers throughout the United States were interstate sales.

In *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, it was alleged by the Printing Press Company that organizations of machinists with headquarters at New York City, together with their international association, for the purpose of compelling a manufacturer to unionize its factory in Michigan and to enforce the closed shop, the eight hour day, and the union scale of wages, had entered into a combination to interfere with and restrain the manufacturer's interstate trade by means of a secondary boycott, and that the manufacturer's customers in and near New York were warned, with threats of loss and sympathetic strikes in other trades, not to purchase or install its presses. Other acts were alleged to have been committed by the

union which seriously interfered with the interstate trade of the manufacturer and caused great loss to its business. A suit for an injunction was brought under the Clayton Act and the Court granted the injunction, finding that the acts of the defendants amounted to a combination and conspiracy to restrain interstate commerce. *Cf. United States* v. *Brims*, 272 U. S. 549.

The decision of the Court in the *Duplex* case was followed in *Bedford Cut Stone Co.* v. *Journeymen's Stonecutters' Ass'n.*, 274 U. S. 37, in which the petitioner and twenty-three other corporations, all in the business of quarrying or fabricating Indiana limestone, enjoined the Stonecutters' Association from combining and conspiring together to commit and from committing various acts in restraint of interstate commerce. The Constitution of the Association provided that no member of the Association should work upon stone cut by non-union workers. The Bedford Company insisted upon employing non-union men at its quarry and a general strike was called by the union of all its members throughout the several States. As a consequence stone work generally stopped because of the large number of union stonecutters throughout the States. There was no boycott involved in this case—simply a peaceful strike of members of the union. The Court said (page 54):

> "Whatever may be said as to the motives of the respondents or their general right to combine for the purpose of redressing alleged grievances of their fellow craftsmen or of protecting themselves or their organizations, the present combination deliberately adopted a course of conduct which directly and substantially curtailed, or threatened thus to curtail, the natural flow in interstate commerce of a very large proportion of the building limestone production of the entire country, to the gravely probable disadvantage of producers, purchasers and the public;"

and (page 46):

> "That the means adopted to bring about the contemplated restraint of commerce operated after physical transportation had ended is immaterial [Citing cases]. The product against which the strikes were directed, it is true, had come to rest in the respective localities to which it had been shipped, so that it had ceased to be a subject of interstate commerce * * * In other words, strikes against the local use of the product were simply the means adopted to effect the unlawful restraint"

and then went on to quote *Eastern States Lumber Ass'n.* v. *United States,* 234 U. S. 600 at 613:

> "Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted."

Under the Sherman Act the effect of prices upon interstate trade has been clearly recognized and that Act has been construed to prohibit the fixing of prices by agreement where the effect is unreasonably to restrain interstate commerce. *American Column & Lumber Co.* v. *United States,* 257 U. S. 377; *United States* v. *Trenton Potteries,* 273 U. S. 392. As stated in the former case, it has been repeatedly held by the Supreme Court that any concerted action by any combination of men or corporations to cause, or which in fact does cause, direct and undue restraint of competition in interstate commerce, falls within the condemnation of the Act and is unlawful. In that case the Court quoted with approval from *Northern Securities Co.* v. *United States,* 193 U. S. 197, where it was said that the Act forbade any combination

> ". . . which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words that to destroy or re-

> strict free competition in interstate commerce was to restrain such commerce."

The *Trenton Potteries* case took note of an agreement among those controlling over eighty per cent of the business of manufacturing and distributing sanitary pottery in the United States to fix and maintain uniform prices and held that such agreement violated the Sherman Act without regard to whether the prices in themselves were reasonable or unreasonable.

In *American Can Co.* v. *Ladoga Canning Co.*, 44 Fed. (2d) 763 (cert. den., 282 U. S. 899), the Court permitted a packing company to recover triple damages under sections 2 and 4 of the Clayton Act because the defendant manufacturer sold cans to a packing company, a competitor of the plaintiff, at discriminatory prices. The Court upheld this application of the statute, although over 99% of the sales to the favored concern were intrastate, upon the ground that the price discrimination in the intrastate sales of cans affected interstate commerce in goods manufactured therefrom. If Congress can control the price a manufacturer pays for his supplies where this is an element in his subsequent interstate competition, it should be able under like circumstances to bring within its control certain features of his relations with his employes.

United States v. *E. C. Knight Co.*, 156 U. S. 1, *Hopkins* v. *United States*, 171 U. S. 578, and *Anderson* v. *United States*, 171 U. S. 604, in which the Court held that since the refining of sugar and the operation of stock yards were local transactions, the Sherman Act would not apply to them, have now in effect been overruled, as the Supreme Court subsequently has not hesitated to apply the prohibitions of the Anti-Trust laws to any activity, whether in itself interstate or intrastate in character, of which the regulation has been considered necessary to carry out the purposes of the law. Likewise, *United Leather Workers* v.

Herkert & Meisel Trunk Co., 265 U. S. 457, may be considered as overruled by the second *Coronado* case and the *Stonecutters'* case, *supra*.

It is clearly apparent from all the cases construing the Anti-Trust Acts that even though the fixing of prices and rates are in themselves purely local matters, nevertheless when their effects are felt in interstate commerce they become a proper subject of control.

In *United States* v. *Ferger*, 250 U. S. 199, the Court sustained a statute making it a crime to forge a bill of lading representing an interstate transaction. The burden on commerce was held to be the unwillingness to purchase valid bills which might be engendered by the circulation of fictitious bills, because if bills of lading are not readily marketable the flow of commerce is likely to be impeded.

Other cases in which transactions, although purely local and preceding actual movement of goods in an interstate journey, are numerous: See *Loewe* v. *Lawlor*, 208 U. S. 274; *United States* v. *Reading Co.*, 226 U. S. 324; *United Fuel Gas* v. *Hallahan*, 257 U. S. 277; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50. The latter case finds that a business which included the buying of grain in North Dakota for shipment to other States was interstate commerce; that the State statute requiring purchasers of grain to obtain a license and pay a license fee was a direct burden on interstate commerce; and that even when the particular subject remains unregulated by Congress, a State cannot lay burdens on interstate commerce in the guise of police regulations to protect the welfare of her people.

In *Standard Oil Co.* v. *United States*, 283 U. S. 163, the Anti-Trust Act was held applicable to the defendants although the conduct in question related only to the manufacture of gasoline. The Court said:

> "Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to limit

> the supply or fix the price of goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibition of the Act";

and in *Local 167* v. *United States*, 291 U. S. 293, the Court observed:

> "But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the state of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce."

The question of whether strikes directly affect interstate commerce was decided in the *Coronado* cases (259 U. S. 344; 268 U. S. 295), cited in the *Schechter* opinion, *supra*, as showing the difference between direct and indirect effects on commerce. In the first *Coronado* case it was held that a strike did not in itself affect commerce. On the second trial of the case it was proved that the miners intended not merely to stop mining, but also to stop the interstate movement of coal, and so it was held that the strike was a direct burden upon interstate commerce.

In the case of *In re Debs*, 158 U. S. 564, which grew out of the Pullman strike of 1894, this Court established the authority of the Government to intervene in an industrial dispute which threatens to distrupt interstate commerce "whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation."

Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420, arose under the Packers and Stockyards Act (42 Stat. 159; 7 U. S. C., ss. 181-183, 191-195, 201-203, 205-217, 221-229); and upheld the power of Congress to issue orders prescribing charges of persons engaged in buying and selling livestock on a commission basis at stockyards.

Carter v. *Carter Coal Co., et al.*, 298 U. S. 238, wherein the Bituminous Coal Conservation Act of 1935 (49 Stat. 1008) was held unconstitutional, is, we think, inapplicable on the question of the constitutionality of the National Labor Relations Act. We think that the case at bar belongs within the (*sic*) "restricted field" covered by the *Swift & Co.* and kindred cases. Inapplicable, too, are *Kidd* v. *Pearson*, 128 U. S. 1, and other cases on the question of whether State taxes and regulations burden interstate commerce.

The question, and the whole question involved herein as we see it, is whether or not Congress has the power to lift, by legislation, those burdens on interstate commerce which grow out of the stubborn refusal of employers to accord to their employes the same rights with respect to association and mutual banding together for economic well-being which the employers have always had and would not be without.

It is not our intention to burden the Court with an extended discussion of the many cases, or long argument or deductions drawn from those cases; but we do assert that in our opinion the cases preponderantly show that the National Labor Relations Act is a proper exercise of the powers delegated to Congress by the Constitution. The Act is very similar to the Railway Labor Act, which has been declared constitutional by this Court. The only question is how broad a class of employers this Act will apply to. It becomes a question of fact rather than of law to show the effect on commerce among the States of the activities of the great interstate industries, such as steel, automobile, rubber and textiles, built up in converting raw materials or accessories imported from one State into another State where are manufactured or assembled the finished products which are sold in still other States.

C. THE FINDINGS AND POLICY DECLARED IN SECTION 1 OF THE ACT ARE ENTITLED TO WEIGHT IN DETERMINING THE ACT'S VALIDITY.*

Congress, in section 1 of the National Labor Relations Act, has painstakingly enacted its findings and policy with respect to eliminating causes of obstructions to interstate commerce. Ordinarily, an act of Congress is presumed to be valid until the contrary is proved; and the declared purpose of Congress in enacting a law is accorded respect, unless the law obviously lies beyond the power of Congress to enact.

In *Block* v. *Hirsh*, 256 U. S. 135, the Court said:

> "No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts. *Shoemaker* v. *United States*, 147 U. S. 282, 298. *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 606.

---

* Besides the testimony heard by the Committees of Congress while the measure was pending, they considered: Daugherty, Labor Problems in American Industry (1933), pp. 356, 358; Douglas, An Analysis of Strike Statistics, Journal of American Statistical Association (September, 1923), pp. 866-877; Monthly Labor Review, June, 1932, pp. 1358-1362; W. I. King, The National Income and Its Purchasing Power (National Bureau of Economic Research, 1930), p. 56; United States Commissioner of Labor, Twenty-first Annual Report: Strikes and Lockouts (1906); Strikes and Lockouts in the United States, 1916-32; Monthly Labor Review, June, 1933, pp. 1295-1304; Monthly Labor Review, July, 1934, pp. 68-82; Monthly Labor Review, March, 1935, p. 677 ff.; United States Coal Commission, Labor Relations in the Bituminous Coal Industry (1923); National Association of Manufacturers, Convention Proceedings, 1926, p. 136; Hammond and Jenks, Great American Issues (1921), p. 99; N. Olds, The High Cost of Strikes (1921), p. 210; Fitch, Causes of Industrial Unrest (1924); Commons and Andrews, Principles of Labor Legislation (1920), p. 125; Congressional Record, vol. 78, pt. IV, p. 3443; Report on the Steel Strike of 1919: Commission of Inquiry for the Interchurch World Movement (1920); Report of the Anthracite Coal Strike Commission, United States Bureau of Labor, Bulletin No. 46 (1903); Labor Relations in the Bituminous Coal Industry, United States Coal Commission (1923); Report of the Board of Inquiry for the Cotton Textile Industry (1934) (appointed by President Roosevelt under Public Resolution No. 44). See House Committee Report of June 10, 1935.

In this connection, *see also* the First Annual Report of the National Labor Relations Board, pp. 60-66, and Bulletin No. 1, National Labor Relations Board, Division of Economic Research, August, 1936, pp. 160-161.

Prentis v. *Atlantic Coast Line Co.*, 211 U. S. 210, 227. *Producers Transportation Co.* v. *Railroad Commission*, 251 U. S. 228, 230. But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact. That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world."

This doctrine is affirmed in even stronger terms in *Stafford* v. *Wallace, supra,* where the Court said (page 512):

> "We have framed the statement of the case, not for the purpose of deciding the issues of fact mooted between the packers and their accusers before the Federal Trade Commission or the Committees on Agriculture in Congress, but only to enable us to consider and discuss the Act whose validity is here in question in the light of the environment in which Congress passed it. It was for Congress to decide, from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted."

And also at page 521:

> ". . . it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

In *Chicago Board of Trade* v. *Olsen, supra,* the statement of the case on page 10 includes the following:

> "The conclusions of Congress expressed in the recital of §3 as to the detriment to interstate commerce from constantly recurring manipulation of sales for future delivery were reached after many years of investigation and examination of witnesses, including the advocates of regulation and those opposed, and men intimately advised in respect to the grain markets of the country."

In that same case the Court quotes *Stafford* v. *Wallace* as quoted above, and says further (page 37):

> "In the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein.
>
> "It is clear from the citations, in the statement of the case, of evidence before committees of investigation as to manipulations of the futures market and their effect, that we would be unwarranted in rejecting the finding of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does work to the detriment of producers, consumers, shippers and legitimate dealers in interstate commerce in grain and that it is a real abuse."

Later cases amply sustain these opinions of the Court. The State statute considered in *Home Building and Loan Ass'n.* v. *Blaisdell*, 290 U. S. 398, was the Minnesota moratorium law in which the lengthy preamble was by reference incorporated into section 1 of the Act. Regarding the findings of the Act the Court said:

> "The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking

> in adequate basis. . . . The economic emergency which threatened the loss of homes and lands which furnished those in possession the necessary shelter and means of subsistence was a potent cause for the enactment of the statute."

The findings and policy declared in section 1 of the National Labor Relations Act are nothing new. Why the fact that Congress has laid a basis for the operation of the law in this section should be regarded as an attempt to clothe the purposes of the Act with a declared intent other than the real intent, is hard to understand, in view of earlier decisions of the Court. E. g., in addition to the cases discussed, see *McCullough* v. *Maryland*, 4 Wheat. 316; *United States* v. *Fisher*, 2 Cranch 358; *Legal Tender Cases*, 12 Wall. 457; *Farmers and Mechanics National Bank* v. *Deering*, 91 U. S. 29, 33; *Julliard* v. *Greenman*, 110 U. S. 421; *Ex parte Curtis*, 106 U. S. 371; *Northern Securities Co.* v. *United States*, *supra*; *Ling Su Fan* v. *United States*, 218 U. S. 302; *Board of Trustees of University of Illinois* v. *United States*, 289 U. S. 48.

The refusal of an employer to let his employes set up their own bargaining agency free from his interference in a manufacturing plant may have seemed in former days to have been an intrastate activity; but when it is shown that iron, ore or rubber or other raw materials, or manufactured parts to be used in completing a machine are shipped from one State to a manufacturing plant in another State and there made into finished products which are shipped and sold in still other States and abroad, we have the very essence of what constitutes commerce among the States.

Particularly is the automotive industry responsible for a constant stream or current of commerce between the States. Factories in Michigan are unable to finish an automobile and fill orders in New York and other States because of inability to procure glass from Pennsylvania or rubber from Ohio, because there are labor disputes at plants in

the latter States growing out of the refusal of employers to recognize unions of employes. Automobile assembly plants and automobile body plants in Georgia and Missouri must close down, throwing thousands of employes out of work, because factories in Michigan are closed because of lack of materials from Ohio.

According to the "Monthly Labor Review" for May, 1936 (p. 1301), 31,642 automobile workers were involved in strikes in 1935, with a resultant loss of 335,794 man-days. Of the 2,014 strikes beginning in 1935, the major issues in 47.3 per cent of them were union recognition and other matters pertaining to organization (ibid., p. 1307).

D. THAT THE ACT MAY INCIDENTALLY AFFECT MATTERS OTHER THAN THOSE DIRECTLY ENTRUSTED TO THE FEDERAL GOVERNMENT TO REGULATE DOES NOT IMPAIR ITS VALIDITY.

Unless obviously otherwise and so shown, the declared purpose of an act of Congress must be accepted as the real purpose to be attained in fact.

The purpose of Congress in those acts which attempted to regulate child labor and hours and wages through an exercise of the powers of taxation and over commerce, readily can be distinguished from the purpose of the National Labor Relations Act. In the former acts Congress attempted by indirection to do what it could not do by direction, that is, to regulate the production of articles intended for interstate commerce. It assumed the right to forbid commerce from moving or to allow it to move only at the price of an unreasonable penalty, and thus destroy it as to the particular commodities at which regulation was directed.

The statute considered in the case of *Hammer* v. *Dagenhart*, 247 U. S. 251, prohibited interstate commerce in products of child labor. The Court said that the real purpose of the Act was not the regulation of commerce but the regulation of working hours of children within the States.

An analysis of this case makes the application of the rule of law laid down there very limited. The Court in this opinion asserted the general rule that power to govern commerce does not include the power to prohibit commerce among the States, and in the same breath noted those cases in which laws prohibiting the transportation of lottery tickets, impure foods and drugs, liquor and women had been upheld, justifying those laws on the ground that the use of instrumentalities of interstate commerce were necessary to the accomplishment of harmful results and therefore regulation could only be accomplished by prohibition. The opinion finds that this element was wanting in the *Dagenhart* case and said that the thing wanted to be accomplished by the Child Labor Law was the denial of the facilities of interstate commerce to manufacturers employing children within the prohibited ages. So it is clear that this case, rather than being against the constitutionality of the National Labor Relations Act, does not have a great deal of bearing on it, and as Mr. Justice Holmes in the dissenting opinion in that case reminds us, the power to regulate commerce cannot be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State, as shown by taxes upheld on oleomargarine, on State banks, on corporations, and also by operation of the Anti-Trust Acts.

The qualification imposed upon Congress in the exercise of its powers is clear -- the intent to regulate commerce as declared by Congress, if valid, will be sustained; but if the avowed purpose of the act is not the direct one, which really is a regulation of local matters, then the Court will not uphold Congress in attempting to do something which it otherwise could not do.

In *McCray* v. *United States,* 195 U. S. 27, the Court had before it the question of the constitutionality of a Federal statute imposing a burden of 10c a pound upon oleomar-

garine colored to look like butter. There is obviously no express power under which Congress can directly prohibit the manufacture of such an article. It was contended in challenging the validity of the law that the tax imposed would prevent the manufacture of oleomargarine; that this was the purpose of the law; and that therefore the statute was unconstitutional. The Court denied this argument and held that the manufacture of oleomargarine is a legitimate subject of excise tax and that the Court itself had no authority to inquire into the motive with which Congress imposes a tax. In other words, the Court found Congress had the power to legislate on the subject absolutely and irrespective of any effects.

If an exercise of a power incidentally confers upon Congress a power in the nature of a police power, it has been decided many times that this does not affect the validity of the act, if the act is a proper exercise of the power. The Act of March 1, 1913, known as the Webb-Kenyon Act (37 Stat. 699; 27 U. S. C., s. 122), operated to give effect to the provisions of a State law, which prohibited the bringing into the State by carriers of intoxicating liquors intended for personal use, by withdrawing from such shipments the immunity of interstate commerce and to forbid the shipment or transportation into the State of liquor intended to be received or possessed there for personal use, contrary to the State statute. The Court found that Congress had the power under the commerce clause to enact this law. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311.

The Act of June 25, 1910, known as the White Slave Act (36 Stat. 825; 18 U. S. C., ss. 397-404), was attacked and alleged to be unconstitutional on the ground, among others, that it attempted to regulate matters purely under the control of the States. The Act provided against transporting or causing to be transported, or aiding and assisting in obtaining transportation, or persuading or enticing any

woman from place to place in interstate commerce for the purpose of prostitution. The Court held (*Hoke* v. *United States*, 227 U. S. 308) that Congress had the power under the commerce clause to prohibit transportation among the several States; that the power is complete in itself; and that Congress as an incident to it may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations.

Point II

The Act Does Not Contravene the Fifth Amendment.

The right of workers to organize into unions is a legal right possessed without regard to any act of Congress. This right has been recognized by the courts of this country since 1842. What the National Labor Relations Act does is to forbid employers to interfere with this right of their employes to self-organization and the selection by employes of representatives for collective bargaining. This Court in *Texas & New Orleans R. R. Co.* v. *The Brotherhood*, 281 U. S. 548, recognized the right of self-organization which belongs to employes and denied that the employer had any right to interfere with such organization. In that case the Court said without reservation that "the prohibition by Congress of interference with the selection of representatives . . . instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both."

The eloquent championship of the right of an individual worker to bargain for the sale of his own labor against the might of a large corporation is out of place in this discussion. This Act in no wise seeks to take away this right, empty as it is. A study of union wage scales in contrast with non-union wages shows how academic a right individual bargaining is. The States' sanction to combinations

of capital into large corporations, the merger of those corporations into huge holding companies, some with assets in excess of two billions of dollars, and the alliance of these employing concerns into trade associations, have placed employes who rely on individual bargaining completely at the mercy of employers.

The necessity of collective bargaining and the reasons why individual bargaining has virtually disappeared is stated very clearly in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184. This was a case where a corporation operating a large plant for the manufacture of steel products filed a bill in the Federal Court to restrain the Central Trades Council and certain individual members thereof from carrying on a conspiracy in violation of the provisions of the Clayton Act, to prevent complainant from retaining and obtaining skilled laborers to operate the plant. Chief Justice Taft, in the opinion in that case, recognizing the right of employes to organize into a union for the purpose of dealing with their employer, wrote:

> "They [labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer

and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild."

More than fifty years ago Congress began a consideration of legislation for the settlement of labor disputes on the railways and in 1888 enacted a law for the voluntary arbitration of railway labor disputes and for the appointment of Presidential commissions to investigate and bring about settlements (25 Stat. 501). Ten years later Congress supplanted this Act with the Erdman Act (30 Stat. 424) which provided for governmental mediation and for voluntary arbitration. The Newlands Act in July 1913 (38 Stat. 103) created a permanent Board of Mediation on the railways. In 1916 the Adamson Act (39 Stat. 721; U. S. C., s. 65) was passed establishing an eight hour day for train operators. The Transportation Act of 1920 followed and under Title III (41 Stat. 469) there was created the Railroad Labor Board with power to hear and decide disputes and provide for the self-organization and collective bargaining by employes. These provisions were sustained in the cases of *Pennsylvania R. R. Co.* v. *United States Railroad Labor Board*, 261 U. S. 72 (1923), and in *Pennsylvania Federation* v. *Pennsylvania R. R. Co.*, 267 U. S. 203 (1925). The Railway Labor Act of 1926 (44 Stat. 577; 45 U. S. C., ch. 8) supplanted Title III of the Transportation Act and, as amended by Congress June 21, 1934 (48 Stat. 1185), and April 10, 1936, is now the law which prohibits railroads from interfering with the right of employes to organize and

has constituted a model for the National Labor Relations Act.*

The principles of labor relations are no different in other industries from what they are on the railroads. Railroads are not the only form interstate commerce takes; it is the products which are shipped over the roads that make interstate commerce, and if the shipment of these products did not take place there would be no need for railroads.

The Railway Labor Act of 1926 as amended, contains provisions declaring that it is the duty of carriers and their employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes in order to avoid any interference with operation. The right of employes to organize and bargain collectively is affirmed and it is declared that

> "The majority of any craft or class of employes shall have the right to determine who shall be the representatives of the craft or class"

for the purposes of the Act. Discrimination against union activities and interference with self-organization and the selection of bargaining agents is prohibited, and the carriers are forbidden to assist or contribute funds to labor organizations. The National Mediation Board is created to hear disputes and adjust controversies.

In *Texas & New Orleans R. R. Co.* v. *The Brotherhood, supra,* the right of Congress to guarantee freedom of organization, to prohibit the company-dominated union, and to prevent employers from requiring membership or nonmembership in any union, was upheld in a suit brought under the Railway Labor Act by a labor union to restrain the railroad from interfering with the right of its employes to

* For a concise and complete history of government intervention in labor disputes see National Labor Relations Board, Division of Economic Research, Bulletin No. 1, August, 1936, pp. 33-50.

self-organization and the designation of representatives. The Court in this decision unanimously upheld the lower court, which had decreed that the railroad company should: first, disestablish the company union; second, reinstate the Brotherhood as representative until the employes by secret ballot should make a choice; and third, restore to service certain employes who had been discharged for their activities in behalf of the Brotherhood. Although *Adair* v. *United States*, 208 U. S. 161, held it not within the power of Congress to make it a criminal offense against the United States for a carrier engaged in interstate commerce to discharge an employe simply because of his membership in a labor organization, holding such provision repugnant to the declaration of the Fifth Amendment of the Constitution that no persons shall be deprived of liberty or property without due process of law; and although *Coppage* v. *Kansas*, 236 U. S. 1, declared unconstitutional a state statute declaring it a misdemeanor for an employer to require an employe to agree not to become or remain a member of any labor organization during the time of the employment, such statute being held repugnant to the due process clause of the Fourteenth Amendment, the decisions in these two cases were held inapplicable and the present Chief Justice wrote:

> "We entertain no doubt of the constitutional authority of Congress to enact the prohibition. The power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697); to 'foster, protect, control and restrain' (*Second Employers' Liability Cases*, 223 U. S. 1, 47). Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual condi-

tions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interference with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both. The petitioners invoke the principle declared in *Adair* v. *United States*, 208 U. S. 161, and *Coppage* v. *Kansas*, 236 U. S. 1, but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds."

This Court in general principles with respect to due process enunciated from time to time has said that the Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases; that the Fifth Amendment does not prohibit government for the public welfare, but merely conditions the exertion of the

admitted power by requiring that the means selected be not unreasonable, arbitrary or capricious and that they have a real and substantial relation to the object sought to be attained.

There are many instances of valid regulation as restricting the right of contract. (See *Nebbia* v. *New York*, 291 U. S. 502, note 25.)

Other cases, in which this and other courts have expressly taken note of the inequality of bargaining power between employer and employe, include *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *McLean* v. *Arkansas*, 211 U. S. 539; *Chicago B. & Q. R. R.* v. *McGuire*, 219 U. S. 549; *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418; *International Text Book Co.* v. *Weissinger*, 160 Ind. 349; *Adair* v. *United States, supra*, and *Coppage* v. *Kansas, supra*.

The right of employes to organize has been recognized by courts in this country for nearly a hundred years and has been confirmed by several decisions of the Supreme Court of the United States. The only thing new in the National Labor Relations Act is that the Railway Labor Act prohibition against railroads interfering with the right of their employes to organize and select representatives for collective bargaining is now extended to all other employers engaged in interstate commerce, or in activities directly affecting it.

The National Labor Relations Act in forbidding an employer to interfere with the right of his employes to self-organization is not invading any established right of that employer. Public welfare demands that employers be restricted in many respects in their dealings with their employes.

Point III

The Act Does Not Contravene the Seventh Amendment.

The order of the Board directs that the Company reinstate with back pay the employes found by the Board to have been discharged in violation of the Act. The objection to this part of the order on the ground that it denies the Company the right to a trial by jury, can have no force in view of the *Texas & New Orleans* case, *supra*, where, by the terms of the District Court decree therein affirmed, the railroad was required to "make whole" the employes discharged for the wages lost by them through their discharge in violation of the Railway Labor Act.

The terms of the order to cease and desist and make whole the employes are equitable in nature and were unknown at common law. With respect to the constitutional provision that the right of trial by jury shall be preserved in suits at common law, it was said in *Shields* v. *Thomas*, 59 U. S. 253, that

> "This provision, correctly interpreted, cannot be made to embrace the established, exclusive jurisdiction of courts of equity, nor that which they have exercised concurrent with courts of law; but should be understood as limited to rights and remedies peculiarly legal in their nature, such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law."

In a case arising under the National Labor Relations Act, the Circuit Court of Appeals for the Fifth Circuit, stated the law in this respect very clearly (*Agwilines, Inc.* v. *National Labor Relations Board*, decided December 22, 1936):

> "... that as between employer and employee the statute confers no right of action triable by a jury or otherwise.

No provision in it authorizes an employee to make claim. The Act does not purport to confer, it does not confer, private rights. It is only to rights and remedies as they were generally known and enforced at common law by jury trial that the Amendment applies. *Cole* v. *United States*, 91 U. S. 376; *Crowell* v. *Benson*, 285, U. S. 22; *Dimick* v. *Schiedt*, 293 U. S. 474; *Shields* v. *Thomas*, 18 How. 253. The prohibition against interference by employers with self organizations of employees were not only unknown, they were obnoxious to the common law. *Pennsylvania Federation* v. *Pennsylvania R. R. Co.*, 267 U. S. 213. The procedure the statute outlines is not designed to award, the orders it authorizes do not award, damages as such. The proceeding is not, it cannot be made, a private one to enforce a private right. It is a public procedure, looking only to the public ends. The statute has in mind, the maintenance and furthering of industrial amity, and therefore peace, the prevention of industrial war. Viewed as administrative procedure, the proceedings and orders in question present no constitutional difficulties. Thus, there may be, there are, administrative fines. Customs appraisers finally decide values. Licenses which the Government confers it may and does take away, without a jury trial. The procedure provided here looks to, the orders authorize, cease and desist orders to bring unfair practices to an end. That they reprobate and end them from the beginning presents no constitutional difficulty. Ample precedent exists in the Federal Trade Commission Act and the practices and decisions under it, for the authority granted here to the Board upon a finding that unfair labor practices have occurred to order a ceasing and desisting from them. When the practices are found to be the wrongful discharge of employees, and the wrongful failure to restore them to work because of their union activities, it is clear, we think, that a cease and desist order, made operative under the authority of the statute from the time of discharge, is as clearly within constitutional authority as if made effective alone for the future."

Point IV.

The Provisions of the Act are not an Unconstitutional Delegation of Legislative or Judicial Power.

The National Relations Board, like the Federal Trade Commission, is an independent agency exercising no legislative or judicial powers in derogation of the constitutional separation of the functions of government, but only such authority as is subject to complete judicial review. It is an impartial body charged with the enforcement of no policy except the policy of the law. It is no different from the Interstate Commerce Commission or the Federal Communications Commission or the Federal Trade Commission in that respect.

The courts have long since recognized the power of Congress to vest in quasi-judicial administrative tribunals the power to decide matters capable of being acted upon by the judicial power. *Crowell* v. *Benson*, 285 U. S. 22; *Federal Radio Commission* v. *Nelson B. & M. Co.*, 289 U. S. 266. In this Act as in the others mentioned herein, there is no lack of provision for judicial review. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67; *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n*, 273 U. S. 52; *Federal Radio Commission* v. *Nelson Bros. B. & M. Co.*, *supra*.

Point V

The Board's Findings are Entitled to Weight; and its Order Should be Enforced.

The administrative and enforcement provisions of the National Labor Relations Act (section 10) are very similar to the provisions of the Federal Trade Commission Act (38 Stat. 717; 15 U. S. C., ss. 41-51). Section 10(e) of the Na-

tional Labor Relations Act provides that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive"; and the same provision is also found in the Federal Trade Commission Act. It is settled law that in reviewing findings of the Federal Trade Commission the Court will not make its own appraisal of the testimony, and that the weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn therefrom, are matters for the Commission. *Federal Trade Commission* v. *Algoma Lumber Co., supra; Federal Trade Commission* v. *Pacific States Paper Trade Ass'n, supra.* We may assume that the law is the same with respect to the National Labor Relations Board and its findings.

In the case at bar, the Board's findings with respect to the business of the Company adequately demonstrates a proper application of an act designed to remove the barriers to free-flowing interstate commerce in the industry.

In its decision, the Board states that the Fruehauf Company is the largest manufacturer of commercial trailers in the United States, sells its product through thirty-one branches, in Toronto, Canada, and in 12 states other than Michigan, and also through distributors and dealers in all principal cities of the United States; and that the trailers themselves "are designed for the transportation of merchandise, and are extensively used as instrumentalities of commerce between the states". The Company ships 80% of its products out of Michigan. Its sales in 1934 were $3,318,000. In 1932 there were 1300 Fruehauf trailers in use in 16 States. The Company maintains service stations manned by its own mechanics in 31 cities in the United States. These mechanics install the Company's device known as the "fifth wheel", which in almost every case has to be installed at the point of destination before the Company's trailers can be used with tractors and trucks. *1 Decisions and Orders of the National Labor Relations Board*

68. The Board's findings of fact and conclusions of law, upon which its order is based, followed a full and complete inquiry into the facts and circumstances of the dispute between the Company and its employes who were members of the union. After the facts so found, and on the whole record, we do not believe that this Court will find that the decision of the Board was arbitrary or capricious. The characteristics of the Company's business, considered in connection with its standing in the automotive industry, convincingly show that the Company is subject to the provisions of the National Labor Relations Act.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed; and instructions given for the enforcement of the order of the Board.

CHARLTON OGBURN,
Counsel for American
Federation of Labor,
Amicus Curiae.

ARTHUR E. REYMAN,
Of Counsel.